IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1593

JOSEPH EDWARD HINCHMAN,
Petitioner,
v.
PEOPLE OF THE
STATE OF COLORADO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF IN OPPOSITION

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INTRODUCTORY STATEMENT

The respondent accepts the petitioner's statement as to jurisdiction and the petitioner's list of the constitutional provisions involved. However, the factual context of this case requires a restatement of the issues presented.

QUESTIONS PRESENTED

I.

Should the federal judiciary interfere with a state decision that the petitioner waived a fourth amendment claim by not filing a timely motion to suppress nor making a clear contemporaneous objection, particularly where, as here, the petitioner complains merely of a reentry to secure an item inadvertently left behind the day before during a valid warranted search?

II.

Must a state allow cross-examination of a juvenile witness as to the particulars of his prior juvenile transgressions absent any demonstrated present relevance except an attempted general character impeachment?

III.

Is the due process clause offended where, as here, the state supreme court orders correction of a criminal defendant's sentence entered by the trial court when the trial court lacks jurisdiction to do so?

STATEMENT OF THE CASE

The petitioner, Joseph Hinchman, had been having marital difficulties with his wife. He apparently attributed this to his wife's imagined involvement with her former attorney and sometimes employer, Russell Grummin.

On March 2, 1975, the petitioner called Mrs. Grummin and expressed a veiled threat to the life of her husband. That same day, the petitioner called a neighbor youth, Robert Abrahamson, and arranged with Abrahamson for the latter to burn down Grummin's law office in exchange for $200. He suggested that Abrahamson use gas from a gas can located in the Hinchman garage. Abrahamson accomplished the task late that night and subsequently returned the can. Abrahamson insisted that the $200 be placed in a bank account since he had to soon report to a juvenile detention facility as a result of a prior delinquency adjudication.

Mrs. Hinchman, distraught at the arson of her employer's office and fearful that the perpetrator might be close to home, talked with Abrahamson twice after the fire. She expressed her suspicions to the police who also talked with Abrahamson at the juvenile facility. After consulting with counsel and arranging for reduction of the arson related charges, Abrahamson told his story and agreed to testify against the petitioner.

On the basis of Abrahamson's statement, a warrant was obtained to search the Hinchman home. Several gasoline cans were seized in the garage. However, in the process of securing the garage door behind him, the fire investigator mistakenly left one gas can behind. The officer realized his error the following day and returned to tape the nozzle of the can ostensibly to prevent vapors from escaping and insure future analysis. Four or five days later, the investigator contacted Mrs. Hinchman who, according to her testimony, volunteered to obtain the gas can that was left behind. Subsequent analysis revealed that the contents of the can had similar chemical characteristics as samples of the substance found in the "fire trial" at lawyer Grummin's office.

No motion to suppress evidence relating to this gas can (exhibit T) was filed prior to trial as required by Colorado

rules. Rather, the defense objected during the course of the investigator's trial testimony solely on the basis that the testimony gave some indication that Mrs. Hinchman had been induced by the authorities to sieze the gas can. The defense claimed unawareness of this information prior to trial. The defense did not then represent to the trial court unawareness that the investigator had returned to the Hinchman home to tape the nozzle (ff. 547-599). The trial court conducted an *in camera* hearing and concluded that the defense had had sufficient information as to Mrs. Hinchman's seizure of the can in order to file a timely motion to suppress. The belated motion, predicated on the notion that Mrs. Hinchman was an agent of the authorities, was consequently denied.

Young Abrahamson also testified at trial. The defense questioned him as to the specifics of his exchange of testimony for a reduction in charges. The defense further sought the specifics of his prior juvenile adjudication. (It appears from the record that four or five months prior to trial, Abrahamson agreed to testify against others concerning a felony murder in exchange for treatment as a juvenile rather than as an adult. Neither the degree of his involvement in that offense nor the particulars of the juvenile proceeding against him is clear from the record.) The trial court refused to allow the defense to inquire into the specifics of the prior offense but did allow the defense to further establish on cross-examination that Abrahamson had been in previous trouble with the law, that he had received favorable treatment in exchange for testimony against others, and that he did honor the arrangement by testifying.

The petitioner was found guilty and sentenced initially on the arson count to five to six years with three years suspended on each end for a net sentence of two to three years.

ARGUMENT

I.

THE QUESTION OF THE PROPRIETY OF THE SECOND ENTRY INTO THE PETITIONER'S GARAGE SHOULD NOT BE ENTERTAINED SINCE THE PETITIONER FAILED TO PROPERLY RAISE THE ISSUE IN THE TRIAL COURT. MOREOVER, THE SECOND ENTRY DID NOT OFFEND THE FOURTH AMENDMENT SINCE IT WAS WITHIN THE RETURN PERIOD OF THE WARRANT.

Both the Colorado Court of Appeals and the Colorado Supreme Court upheld the trial court's procedural denial of the motion to dismiss. *People v. Hinchman*, 589 P.2d 917 (Colo. 1978); *People v. Hinchman*, 40 Colo. App. 9, 574 P.2d 866 (1977). Indeed no motion to suppress was filed in accordance with Colo. R. Crim. P. 41 and the contemporaneous objection at trial was predicated on the asserted late discovery that Mrs. Hinchman was an agent for the authorities when she seized the gas can. Both courts, however, dealt with the appellate claim, now advanced to this court, that the second entry and taping of the gas can by the authorities was violative of the fourth amendment. Both courts found this claim insufficient to excuse raising the issue in the trial court in the absence of some showing that the taping affected the capacity to test or the accuracy of the analysis of the container's contents. These decisions are unquestionably correct.

This court has articulated the principle that a state's enforcement of its own procedural rules which preclude an untimely constitutional claim will be enforced in federal court unless the defendant shows justifiable cause for noncompliance with the rule and also shows actual prejudice from the alleged constitutional violation. *Wainwright v.*

Sykes, 433 U.S. 72, 97 S.Ct. 2497, 55 L. Ed. 2d 594 (1977); *Francis v. Henderson*, 425 U.S. 536, 96 S.Ct. 1708, 48 L. Ed. 2d 149 (1976). This court reasoned that requiring the defendant to clearly raise his constitutional claim first in the trial court benefited the criminal adjudicatory process by allowing the trial court to promptly develop facts pertinent to resolution of the constitutional claim (which lends guidance to the appellate courts) and by encouraging finality by having the issue resolved (possibly favorable to the defendant) at the trial level.

All these considerations here weigh against the petitioner. There is no justifiable cause for failure to raise the issue now advanced in the trial court. The trial objection to the evidence was not on the basis now advanced. The petitioner made no showing of prejudice resultant from the alleged constitutional violation. The trial court was not given an opportunity to develop any pertinent conclusions that could guide the reviewing courts. Nor was the trial court fairly afforded an opportunity to rule on the petitioner's favor. Accordingly, the Colorado decision that the petitioner is procedurally estopped from pursuing the constitutional claim should be enforced.

Moreover, the second entry was not an unconstitutional invasion of the petitioner's right. The reentry and taping the gas can was within time period [ten days, Colo. R. Crim. P. 41(d)(5)(V)] and while probably cause still existed to believe the gas can would still be in the garage. The evidence, if obtained at all by the taping of the nozzle, was not obtained by an infringement of the petitioner's fourth amendment rights. The petitioner makes no such substantive claim. Rather, he merely seeks to capitalize on the investigator's error by asking this court to embrace a rule that each entry must have a separate warrant. Such a rule has been judicially rejected. *Scott v. Hocker*, 460 F.2d 303 (9th Cir. 1972); *Connecticut v. Williams*, 169 Conn. 322, 363 A.2d 72 (1975); *see also Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L. Ed. 2d 706 (1973).

II.

THE PETITIONER WAS NOT DENIED EFFECTIVE CROSS-EXAMINATION OF WITNESS ABRAHAMSON SINCE IT WAS ESTABLISHED THAT ABRAHAMSON HAD PLEA BARGAINED THE INSTANT OFFENSE IN EXCHANGE FOR TESTIMONY AND HAD HAD A SIMILIAR ARRANGEMENT AS A RESULT OF A PRIOR CONFLICT WITH THE LAW.

The petitioner next urges this court to scrutinize the limitation of cross-examination of young Abrahamson. Specifically, he sought to question Abrahamson as to the latter's involvement in an episode characterized on the record as a felony murder. Abrahamson had been treated as a juvenile in exchange for his testimony against others. The trial court allowed the defense to establish that the witness had been in trouble with the law before and that he had bargained with the prosecution in exchange for his testimony. Of course, it was also established that Abrahamson had bargained in the instant case in exchange for testimony against the petitioner; that first-degree arson, first-degree burglary and conspiracy charges had been reduced to a single count of second-degree arson. Further, Abrahamson admitted to the jury both marijuana usage and an auto theft the night of the arson. He related that he was testifying against the petitioner as he believed the petitioner had not intended to pay him as agreed.

Nevertheless, citing *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L. Ed. 2d 347 (1974), the petitioner urges that he should have been allowed to examine more extensively by inquiring into the particulars of the offense that resulted in the prior juvenile adjudication. Although the record indicates that Abrahamson was *charged* with accessory to felony murder at one point, it is unclear from the record what actual

offense was the basis of Abrahamson's juvenile court action and thus the defense failed to establish with precision what was available for impeachment. Accordingly, this claim of a prejudicial limitation of cross-examination lacks a factual basis. *See United States v. Decker*, 543 F.2d 1102 (5th Cir. 1976); *United States v. Alvarado*, 519 F.2d 1133 (5th Cir. 1975).

Of greater significance is the inapplicability of *Davis* to the instant case. *Davis* held that a state rule regarding the secrecy of juvenile proceedings must give way to a criminal defendant's confrontation rights in a circumstance in which the juvenile record casts grave doubt on some of the testimony the witness has already given, and might establish the witness' motive to fabricate so as to prevent jeopardizing his probation and so as to cast suspicion off himself. Those factors are not present here. Abrahamson was not on probation but in a detention facility for the prior offense. Abrahamson gave no testimony inconsistent with the existence of his prior juvenile adjudication. And the petitioner is unable to articulate any other particular relevance the prior offense has to the present testimony. He merely asks this court to embrace a rule that the confrontation clause allows any defendant to generally impeach any witness by showing that witness' prior juvenile record. Such has been specifically rejected. *See* the concurring opinion of Justice Stewart in *Davis v. Alaska, supra*, at 321; *United States v. Decker, supra; United States v. Alvarado, supra.*

III.

COLORADO MAY ORDER A RESENTENCE OF THE PETITIONER SINCE THE INITIAL SENTENCE WAS ILLEGAL AS BEYOND THE TRIAL COURT'S AUTHORITY.

Relying on *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L. Ed. 2d 656 (1969) and *Blackledge v. Perry*,

417 U.S. 21, 94 S.Ct. 2098, 40 L. Ed. 2d 628 (1974), the petitioner argues that the Colorado Supreme Court's observation of the illegality of the petitioner's sentence and the remand for resentencing offends his due process rights.

The petitioner was sentenced to five to six years on the arson count with three years suspended from each end for a net sentence of two to three years. The statutory sentencing range for this offense is five to forty years. *See* Colo. Rev. Stat. Ann. 1973, 18-1-105, 18-4-102 (1978 repl. vol.). The Colorado Supreme Court noted that there was no statutory authority to partially suspend sentences and that allowing partial suspensions interferes with the legislature's authority to set the punishment for offenses. Accordingly it was held that the sentence given was beyond the jurisdiction of the trial court. That decision was in December of 1978. However, it was in August of 1977, when the trial court vacated its previous sentence and imposed one within the statutory range. Such was done pursuant to a district attorney motion to correct an illegal sentence under the provisions of Colo. R. Crim. P. 35(a). This motion was made at a time when no state appellate decision directed a resentence.

The petitioner's argument that this sentence change violates due process misapprehends the nature of the *Pearce* and *Blackledge* decisions. Although the state may not vindictively seek to impose a penalty for the exercise of one's appellate rights by substituting an initially legal disposition for a harsher one after appeal, nothing in those decisions indicates that a state supreme court lacks the authority to correct a district judge who acts beyond his authority. Nor can the correction be characterized as vindictive under these circumstances. Accordingly, no due process concerns arise.

CONCLUSION

Thus, the respondent urges that certiorari be denied.

Respectfully submitted,

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